UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

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BABY DOE, ET AL,
Plaintiffs,
vs.
JOSHUA MAST, ET AL.,
Defendants.

CIVIL CASE NO.: 3:22CV49
OCTOBER 11, 2023, 11:03 A.M.
TELEPHONIC MOTIONS HEARING

Before:
HONORABLE JOEL C. HOPPE
UNITED STATES MAGISTRATE JUDGE
WESTERN DISTRICT OF VIRGINIA

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(Proceedings commenced, 11:03 a.m.)

THE COURT: Good morning. This is Joel Hoppe.

Would the clerk please call the case?

THE CLERK: Yes, Your Honor.

This is Civil Action Number 3:22cv49, Baby Doe, et al. versus Joshua Mast, et al.

THE COURT: Who is on the line for the plaintiffs?

MS. ECKSTEIN: Good morning, Your Honor. This is Maya Eckstein. I am joined here with my colleague, Lewis Powell. He and I will be handling the arguments this morning.

Also joined in the conference room is Kevin Elliker, and there may be other counsel of record on the line as well on behalf of plaintiffs.

THE COURT: Who is on the line for Joshua and Stephanie Mast?

MR. FRANCISCO: Good morning, Your Honor. Michael Francisco for Joshua and Stephanie Mast, and I'll be handling the argument this morning. On the other line with me is my partner, John [inaudible], as well as Stephen Tagert and Carson Bartlett.

THE COURT: And who is on the line for Richard Mast?

MR. YERUSHALMI: Good morning, Your Honor. This is David Yerushalmi. And I will be appearing for my client, Richard Mast.

THE COURT: And how about for Kimberley Motley?

MR. HOERNLEIN: Good morning, Your Honor, this is Mike Hoernlein on behalf of Ms. Motley. I have on the line with me as well Sidney Webb and Samantha Van Winter.

MR. BROOKS: Good morning, Your Honor. This is Tyler Brooks. I believe Mr. Boyer is also on the line as well. We are here for Mr. Osmani. So we don't anticipate participating in any motions unless Your Honor has some questions for us, but we have no plans to actually argue on any issues.

THE COURT: And how about for Pipe Hitter Foundation?

MS. CONTESTABLE: Good morning, Your Honor. This is Caitlin Contestable from Chalmers, Adams, Backer & Kaufman. Also on the line is my partner, Dan Backer.

THE COURT: Anybody else on the line who would have any arguments today?

Okay. Well, we are here for four different motions. We have the plaintiffs' motion to compel as to Joshua and Stephanie Mast. That's at ECF 230. We also have Joshua and Stephanie Mast's motion to stay discovery at ECF 237, and Pipe Hitter Foundation's motion to quash the subpoena. That's at ECF 256. Then we have Richard Mast's supplemental motion to compel, which is ECF 289.

I'd like to start off with Joshua and Stephanie Mast's motion to stay discovery. Mr. Francisco, that is your motion. So I'll hear from you first.

MR. FRANCISCO: Good morning, Your Honor. And I'm

glad that the Court started with the motion to stay discovery because we think it's the most sensible resolution, frankly, to all these pending motions, as well as the two other motions to compel that have already been filed that aren't even set for today's hearing.

Notably, in addition to the reasons in the briefing, I would like to let Your Honor know that the Court of Appeals in Virginia has now scheduled oral argument in the appeal of the parallel state case. That case has been fully briefed, and argument is set for November 14th. There was some disagreement in the briefing about whether the state case would be proceeding quickly or not. But from our view, Your Honor, all of these discovery fights are premature. This case hasn't been moving forward on the merits. It's almost a year ago that the complainants filed. We filed a motion to dismiss that we think has merit, and the Court simply hasn't taken action on that. And the parties have willingly bumped the trial date twice I believe in recognition that this case should not be moving forward until the important legal questions about who Baby Doe's legal parents are under Virginia law and the related issues are fully resolved. Those are obviously hotly disputed in the state court case. I won't bore you with the details of it, but suffice it to say that the ultimate outcome of that state court litigation is clearly going to be dispositive of, and argue every issue in this case. And even if it weren't

dispositive of every single issue, it would certainly materially change the case. Just as a simple example, if the court case ultimately holds in Virginia as a matter of Virginia law the Masts are the legal parents of Baby Doe, you can't falsely imprison your own daughter, just as one simple example.

So we think that there is solid basis. There is clear legal case law supporting the reason that this Court has discretion to stay discovery at this time. While we think the stay should be contingent on the ultimate outcome of the state court litigation, if nothing else, Your Honor, I think the stay could be of a specific duration that would allow us to get past the Court of Appeals process in state court, and then it could obviously be reassessed depending on the outcome of that and which direction it's going. But we think it's a waste of judicial resources for anybody to be litigating all of these issues when there's already been a 19,000-page record produced in the state case. That doesn't even include all the discovery. So it's not as if the plaintiffs here don't have the key documents and understanding of what's going on. This is purely derivative.

THE COURT: Anything else, Mr. Francisco?

MR. FRANCISCO: I also intended to mention the prejudice factors I think weigh particularly strongly in favor of a stay. And if you look at the plaintiffs' response on prejudice, they offer nothing about documents being lost or the

need to proceed with the merits of this case. They invoke concepts of custody, which frankly are inappropriate in this tort lawsuit. And there's nothing in the prejudice factor that would weigh against providing a stay of discovery of all these matters.

THE COURT: All right. Thank you.

Ms. Eckstein or Mr. Powell, would you like to address this motion?

MS. ECKSTEIN: Yes. Thank you, Judge Hoppe. This is Maya Eckstein.

Your Honor, we would of course urge you not to enter a stay in this case. We have been down this road before. The arguments that Mr. Francisco and Joshua and Stephanie Mast make in support of the stay are duplicative of the arguments that they made in their motion to dismiss, arguing that the case should be dismissed or stayed in favor of the state court case. But Judge Moon has that issue before him, and he has not dismissed or stayed the case in favor of the state court case. Instead, we have been proceeding with a case. And contrary to Mr. Francisco's assertion, there has been significant activity in the case. Every single party, including Joshua and Stephanie Mast, have participated in discovery to some extent. Every party, except for them, has produced documents, with one small exception regarding the Pipe Hitter situation where Joshua and Stephanie Mast produced I believe 11 pages of

documents. Every party has responded to interrogatories, and several parties have also responded to requests for admissions. So activity has occurred in the case.

To the extent that continuances have been asked for in this case and entered, from plaintiffs' perspective, that has been because of two things: One, we recognize that we need a ruling from Judge Moon on the motion to dismiss to be able to proceed to trial; but second, we can't take depositions without having received all the documents. And because Joshua and Stephanie Mast have absolutely refused to respond to our first request for production of documents, we can't proceed with depositions. And so that has also occasioned the request for continuances.

Turning back to the state court case, the idea that we need to wait until there's a decision in that case is elusory for one significant factor: The state court has ruled in that case. The state court -- on May 3rd, the circuit court issued an order that declared the adoption order that Joshua and Stephanie Mast obtained for Baby Doe, declared it void *ab initio*. And the court made specific findings. It found that John and Dane Doe, quote, "were de facto parents," end quote, of Baby Doe, and that the relationship they had with her was, quote, "effectively an adoption under Afghan law," end quote.

So we have a ruling from the state court. There is no need to wait for anything more from the state court. Now,

Joshua and Stephanie Mast, of course they don't like that ruling, so they filed an appeal. And the Court of Appeals will hear that appeal shortly. I think it's November 15th, but it may be November 14th, as Mr. Francisco said. But whoever loses that appeal is likely to appeal further to the Supreme Court of Virginia and possibly beyond that. So what they seem to be asking for is actually a year's long stay. And there's no rational basis for that.

And while Mr. Francisco is correct, we haven't suggested that documents may be lost or the like, but the case nonetheless needs to move forward. John and Jane Doe's child was, in their view, abducted more than two years ago. The state court has already found the adoption order void *ab initio* based on extrinsic fraud committed by the Masts and the violation of our client's due process rights. So we're still fighting to get her back. The devastation that our clients feel is palpable. Joshua and Stephanie Mast and the other defendants need to be held to account for their conduct. There is no logical basis for delaying this process.

In addition, as we argued in our motion to dismiss briefing, this case and the state court case, while related, they are not the same. This case has different parties, different claims, and seeks different relief than the state court case. Again, we addressed all of this in our motion to dismiss briefing. This Court is not being asked to make a

custody determination. No ruling here can conflict with anything stated or held by state court. And I believe Mr. Francisco said that a resolution in the state court -- the ultimate outcome in the state court case will be dispositive of every issue here. That is simply not the case. The fraud and conspiracy allegations claims that we have here, they go far beyond the Masts' fraud in the Fluvanna court. They go to the fraud committed on the Does themselves. The Masts obtained physical custody of Baby Doe only because the Masts and their cohorts fraudulently induced the Does to bring her to the United States without ever mentioning the existence of that adoption order. Had the Does known of it, they would have never set foot on that plane. And that's alleged squarely in our complaint for both fraud and conspiracy, of course, which is derivative of that claim and others, Paragraphs 162, 163, etc. within that fraud claim -- fraud count.

Our claim for intentional infliction of emotional distress also it alleges that our clients cared for Baby Doe for 18 months as their daughter, and that Joshua and Stephanie Mast and the other defendants' fraudulent conduct led them to travel to the United States where they were able to take Baby Doe away from our clients. No finding by the state court regarding the future custody of Baby Doe impacts that claim. The court's decision in our favor already certainly supports -- adds to the support for our claim, but no decision from the

state court is actually dispositive of that claim or any claim.

And the same goes for the tortious interference of parental rights. A decision holding otherwise does not fail -- it doesn't erase the facts pled by the plaintiffs that they had custodial rights to Baby Doe in Afghanistan up until the moment they arrived at the United States, which is when the defendants interfered with that right. And that right has been recognized by the United States government.

And I will add also that at the Virginia Court of Appeals, the Masts' primary argument is a statute of limitations argument; that the Does cannot attack, cannot challenge the adoption because of the statute of limitations. If the Court of Appeals accepts the Masts' argument -- which they should not and the circuit court did not -- that does not render them her lawful parents. Maybe they have an adoption order, but that doesn't change the underlying fact regarding how they obtained it, what they did to get it, and what they did to the Does to lead to Baby Doe being in their custody.

So, Your Honor, we strongly urge you not to stay the case. I'll add: We served the first request for production in this case ten months ago on December 22nd, 2022. We haven't received a single document from Joshua and Stephanie Mast in response to those requests for production. They seem to demand more documents from the plaintiff, going so far as to file a motion to compel against us last week, but they apparently

don't think the rules apply to them. We ask you to deny their motion to stay and compel them to proceed with discovery.

THE COURT: Mr. Francisco, anything in reply?

MR. FRANCISCO: Yeah, Your Honor, I'll try not to be overly redundant of what's in the briefs, but I couldn't help but notice that the argument at the end there I think just belied the inability of this federal court proceeding to go forward without interfering and rely on the state court proceedings. She said there in the argument that whatever happens in the state court case does not render my client, the Masts, lawful parents. I wrote down the quote as we may have an adoption order, but that doesn't change the underlying facts of who's parents. And Your Honor, that I think is clearly wrong. If you have a valid state adoption order, you have the full lawful right as parents, period, full stop. You can't be held to a $20 million tort case for taking actions to protect your lawful child with a valid adoption order. I think their attempt to run away from the core of the dispute here completely fails, and that it would be impossible for the federal court to interfere with that state court proceeding.

As to the May 3rd order, I think it's worth clarifying -- if it may not be obvious -- that yes, there's a summary judgment ruling on May 3rd, the Fluvanna County collateral attack on the adoption. We are contesting that on appeal. But at the same time, the plaintiffs have asked that

court to also -- [inaudible] -- the custody order under Virginia law, as well as the interim adoption order under Virginia law, and they have asked for actual custody. And they've been rejected on all three of those fronts. So as it stands right now, there's ongoing litigation about whether that final adoption order would be void, and then thus would have to be reopened or litigated. But nothing has decided that the Does have any sort of parental right under Virginia law. And obviously when that appeal is pending, we believe we're going to succeed on appeal, and that the adoption order is going to be fully recognized as having been valid from the get-go.

I think all of this just highlights the lack of need for discovery at this time. It's not as if the plaintiffs don't know what the documents are or what my clients said or did. They've deposed both of my clients. My clients testified for multiple days of cross-examination, and we've given them virtually every document that's related to this issue of what happened to get Baby Doe adopted by my clients. And I don't think any of the arguments have changed those facts.

THE COURT: And Mr. Francisco, the production that you're referring to, was that in the state court case?

MR. FRANCISCO: Yes. And Your Honor, we were -- we believe it's understood from the conferral process that the plaintiffs did not want us to reproduce the exact same set of documents. And so I think it's a little bit of semantics to

say we haven't produced a single document. We've produced 1.3 gigabytes of documents through the state court case. And if it would satisfy somebody to re-Bates stamp them, it would be an entire waste of time, but I suppose we could do it. It's just not true to say we haven't produced the documents. We've produced voluminous documents, and I thought the understanding from conferral was we didn't need to add any Bates label for it to be counted for this case.

THE COURT: I think that's getting into the plaintiffs' motion to compel. Why don't we address that next.

Counsel, I am going to issue written opinions and orders on these motions, but I will tell you that I am going to deny the motion to stay. I do think that discovery needs to go forward in this case. Something that I'm concerned about is just how long the stay could possibly be. Plaintiffs' counsel mentions that there is an appeal. There could be further appeals in the state court. It just seems like this case could be stayed for years. And I do think that that would work a prejudice to the plaintiffs just from the length of the delay. And all the parties are engaged in discovery at this point. So I am going to deny the motion to stay, and I'll elaborate on the reasons in a written opinion.

I would like to move on to the plaintiffs' motion to compel Joshua and Stephanie Mast's discovery responses.

Ms. Eckstein, are you going to address that motion?

MS. ECKSTEIN: I am, Your Honor. Thank you.

So with respect to our motion to compel, as I said earlier, we served those requests for production back in December, and we still have not received any documents in response. Joshua and Stephanie Mast make three arguments in opposition to our motion to compel. First they argue that we've received enough discovery in the state court case. You've heard that from Mr. Francisco today. And they also argue that we've -- that our requests for production in this case are duplicative of those from the state court case. And then finally they argue that the case should be stayed anyway, as we've discussed, not just pending the state court case but also pending resolution of the motion to dismiss.

Again, their position, we find it curious. They apparently don't think they have an obligation to produce documents, but they expect the plaintiff to meet all of their discovery obligations. They have yet to articulate a legal basis for the special treatment they apparently think they deserve. But let me respond to each of those three arguments.

So first they argue that the plaintiffs have received enough discovery in the state court case. The argument is baseless for several reasons. Number one, it just isn't true. Before the circuit court issued its ruling voiding the Masts' adoption order, we, on behalf of the Does, had at least two motions to compel pending against the Masts. Those are

attached as Exhibits 1 and 2 to our reply brief at ECF 245. The circuit court did not rule on those motions because it had essentially reached the ultimate legal issue and issued a summary judgment ruling. But the first motion to compel asks the Masts to be compelled to produce documents or communications regarding Baby Doe, John Doe, or Jane Doe that were shared with third parties, including the U.S. government, the Commonwealth of Virginia, or the Afghan government. Those types of documents are also covered by the requests for production that we served in this case, Numbers 3 through 9, though some of those requests target different types of such documents, or may be broader than what was requested in the state case.

The second motion to compel that remains pending asks for responsive communications between Richard Mast -- who is a defendant here and was counsel for Joshua and Stephanie Mast below -- so communications between him and third parties regarding Baby Doe. Those types of documents are covered by the requests for production that we served here specifically, request Numbers 3 through 17. And again, those requests are worded differently than in the state court documents.

The motions to compel that were pending in the state court case also ask the court to order the Masts to produce a privilege log -- an appropriate privilege log -- identifying each document they were withholding or redacting, and providing

the standard details expected of a privilege log. The one that they had served in the state court case did not meet those standards. Of course, they have yet to serve any privilege log in this case. So there can be no question that plaintiffs did not receive, quote unquote, enough discovery in the circuit court case to satisfy the needs of this case.

In addition, we know from third party production that there are responsive documents in the Masts' possession, custody, or control -- or that should be in their possession, custody, or control -- that they have yet to produce. We noticed in the production that we would see from Liberty University which produced emails, evidence, and communications that neither Joshua nor Stephanie Mast ever produced in the state court case. And we noticed, of course, in the production of the Pipe Hitter Foundation, that situation postdated the state court case, so obviously that information was not produced in the state court case. And I mention that about documents that should be in the Masts' possession, custody, and control because we do have a concern about the destruction of documents. As you know from reviewing the papers regarding the Pipe Hitter Foundation motion, we have significant concerns about the destruction of documents, deletion of emails, and the like. But regardless, plaintiffs certainly have not received enough discovery in the state court case to satisfy the needs of this case.

So with respect to the second argument that Joshua and Stephanie Mast make, that plaintiffs' requests for production are duplicative of those from the state court case, that also is not true for several reasons. First, we served several requests for production that are different from or broader than those served in the state court case. There are at least nine requests for production that we served that have no state court analog. That's Numbers 12, 13, 18, 19, and 24 through 28. And there are at least six requests for production that we served in this case that ask for a broader set of documents than those in the state case. And those are requests for production Numbers 5 through 9.

Second, if the state court production of Joshua and Stephanie Mast satisfied their obligations to respond to requests for production that we served in this Court, they would say so and represent that they fulfilled their discovery obligations. They have not done that, and it's because they cannot do that. In fact, on page 2 of their opposition brief at ECF Number 236, they admit that there is still, quote unquote, extensive discovery to be had. So they have not fulfilled their discovery obligation in this case. Our RFPs -- requests for production -- are not nearly duplicative of what was served in the state court case. And we have not received, quote unquote, enough discovery from the state court for the needs of this case.

With respect to their third argument regarding discovery being stayed, we've already addressed the issue as to the state court action. I think we've already addressed the issue as to -- [inaudible] -- as well. As this Court is well aware, a party doesn't get to just ignore discovery absent a stay of discovery issued by the Court. The pendency of a motion to dismiss does not relieve a party of its obligation to participate in discovery. And Judge Moon heard arguments on the motions to dismiss in February, almost eight months ago. The subject of the stay was discussed at that hearing. If Judge Moon thought a stay was appropriate, I would assume he would have entered one by now. He has not.

So in short, Your Honor, we would ask the motion to compel Joshua and Stephanie Mast to respond to our requests for production that have been pending for more than ten months.

Thank you.

THE COURT: Ms. Eckstein, as to any documents that Joshua and Stephanie Mast did produce in the state court case, does your agreement stand that they would not need to re-produce those in this case?

MS. ECKSTEIN: Yeah. Yes, Your Honor, our agreement was that they do not need to re-produce them in this case unless we identified specific documents that we need re-produced. And I mention that because in the state court case, documents were produced without metadata. And there may

be some specific documents for which we would like the metadata, but those are not going to be extensive. It would be few.

THE COURT: Okay. All right. Thank you.

Mr. Francisco, are you going to address this motion for your clients?

MR. FRANCISCO: Yes, Your Honor.

Your Honor, the difficulty with this motion to compel is they haven't identified anything specific that they need or want that they don't have. They have just generally said that you should enter an order telling us to comply with discovery. And I think that's for good reason. They have virtually all the documents that relate to the key disputed facts in this case.

For example, she relies upon the never-decided, taken-under-advisement motions to compel in the state case related to discovery with third parties for Richard Mast's communication with third parties. Your Honor, there were many, many documents with third parties that were produced already. That motion to compel was not well received largely because it wasn't specific. And our position was that we had produced the communications with third parties, everything from Liberty University to the Virginia Attorney General's Office, to Ted Cruz's office, other congressional offices, the vice president's office. I mean, there were many, many, many

communications with third parties that were produced. And my understanding of the gist of the motion was that they weren't sure we had produced everything, but that's different than saying we haven't produced documents with third parties. And we have asked them in the conferral process to just identify for us what it is they think we have that we haven't given them. And we just haven't been able to get anything specific, and their motion doesn't have it.

I would note on the Pipe Hitter's matter, Your Honor --

THE COURT: Before you move on to that, Mr. Francisco, it may be that it's difficult for the plaintiffs to identify specifically what you haven't provided because your objections are kind of general and you haven't said specifically what you're withholding.

So it's -- I agree there needs to be sort of more work done by both parties to make sure that the discovery is being produced. And the plaintiffs have said that you don't need to re-produce discovery that's already been provided in the state court case. I think it's really incumbent upon you to identify what you're withholding pursuant to any objections, or to produce the discovery now that the stay has been denied or will be denied in the written order.

MR. FRANCISCO: Well, I think I'd like to say two things to that, Your Honor.

Number one, it really is not as if there is a simple button I can switch on and off to produce everything in the universe. And really what we're talking about, just to be clear, is a very burdensome process of re-producing and reviewing a vast amount of data and looking at phones to see if maybe a few documents here and there were missed in the production. We don't believe they were, but I'm not going to certify to a court that I guarantee that there is not one or two emails that might have been missed at first production. We don't think they would be material at this point if they were. But if that's what the Court is going to order, then obviously we'll have to endeavor to do that.

But I also want to note that I don't think this is ready for an order to produce along those lines. For example, she lists just in broad numbers specific requests they don't think overlap with the state case, but many of those, our objections are entirely valid and appropriate. They asked us to produce all the files related to the JDR -- the juvenile and domestic relations court matter -- as well as the adoption court matter in the state case. But Your Honor, they well know that by statute those are confidential and sealed; and, in fact, they filed a motion to intervene in that adoption case itself and have been denied access to the records. So that's not even a good faith request. We can't possibly give them those documents. That's just an example of some of the things

that they're identifying as being outside the Fluvanna County collateral attack proceeding. And they're just not categories that even legally could be produced.

THE COURT: Well, I'll tell you something that would help me in resolving really the substance of this discovery dispute; if there are any legal arguments, like the one you just made about whether your clients can be required to produce documents from the adoption or JDR, is to really focus in on those arguments. We can I think dispense with some of the other broader ones related to the motion to stay. But what I really want to know from the plaintiffs and from you, Mr. Francisco, what are the -- what are some of the specific objections to particular requests so that I can resolve those, if necessary. I don't think that we have that at this point. So really I would -- I would want you all to kind of confer further. I want to think about how to fashion this in an order, but I do think that there needs to be something by way of supplemental responses from you to the discovery requests so that we can really narrow some of the issues, because right now it's just kind of a wholesale objection to all of the requests, as I understand it.

MR. FRANCISCO: Your Honor, I think we have some specific requests. I don't disagree that in light of the Court's ruling that some further refinement may be in order, but I do want to point out that I think the refinement needs to

be on both ends.

For example, we do have a specific objection to many of these requests that it's duplicative and ultimately burdensome and cumulative. Just one point of that, their second request is just a blanket request for all documents from any person or any entity relating in any way to the circuit court matter. I mean, that's more than 20,000 pages plus in the universe, and we believe they already have most of it. And I think that's the type of broad request that is appropriately under Rule 26 cumulative and duplicative of what they already have.

I think they -- if the requests were more pointedly refined, it would be much easier for us to respond and assess the burden of what might potentially be out there. And then, of course, we could make the specific objections from that point.

THE COURT: I think your point is well taken as to that request.

MS. ECKSTEIN: Your Honor --

THE COURT: Yes, Ms. Eckstein, go ahead.

MS. ECKSTEIN: I just wanted to respond to two points that Mr. Francisco made.

Mr. Francisco first said there's not a button he can switch on or off to produce everything, or something to that effect, and referenced a burden to re-produce everything and

re-review phones. I want to make it clear; that's exactly what the plaintiffs have done. We have what we call a refresh where we've refreshed our collection of our clients' phones, and we refreshed our collection altogether to ensure that it was complete. And it was burdensome. It continues to be burdensome. But we're doing it because that's what's needed for this litigation.

And second, Mr. Francisco said that we do not have access to the adoption file. That is absolutely incorrect. The Court granted us access to the adoption file. We have the complete adoption file. To the extent that his clients have additional documents relating to that adoption file, that is covered by the various requests for production. We don't need him to re-produce the adoption file itself that we already have, but other requests for production touch on the adoption file itself.

THE COURT: Okay. Well, as to this motion, you know, I'm going to grant it. And I'll work this out in an order, but I'm going to -- really am going to want you all to confer as to the production, and I'll provide some further guidance in a written order on this motion.

All right. The next one I'd like to take up is Richard Mast's supplemental motion to compel.

Mr. Yerushalmi?

MR. YERUSHALMI: Yes, Your Honor. David Yerushalmi

for defendant Richard Mast.

The supplemental or renewed motion to compel -- however it's nominated -- doesn't have the problems with the motion to compel filed by the plaintiffs that I've just listened to in terms of the back and forth. Our motion on the one hand is very reserved. It simply asks that, one, the plaintiffs actually engage in the meet and confer process by going through our July email where we took the time to go through their production and indicate where we thought the documents were missing. Now, this was back in July. The plaintiffs did not respond to that at all. On two occasions -- once by phone and once by email -- we were told, well, there's a lot there; we're going through it. Two months, with all plaintiffs' counsel involved, they could not respond substantively.

Two weeks following the filing of the motion they responded with five bullet points saying, Well, it's mind numbing. Well, of course. That's what meet and confers are. You go through details, as the Court just indicated to the plaintiffs and to defendant Joshua Mast's counsel. That's what meet and confers do. And those five bullet points that they indicated, we point out that even their documents that they claim were responsive were not accurate. We point that out in detail in our reply brief. So all we're asking for in the motion to compel as to this point is simply for plaintiffs to

do what they should have done sometime during the 60 days preceding the filing of the motion, and what they attempted to do in some small minuscule fashion after the filing of the motion.

The second issue that we've sought is to simply organize the documents in some way that identifies what documents respond to what request. Now, I think this matter has been properly briefed, but just to review, initially plaintiffs took the position that the Does could simply produce the documents in the usual course of --

THE COURT: Mr. Yerushalmi, it seems like the plaintiffs have said that they agreed to do this pairing that you suggest, that they have provided it.

Is there any further argument on this that gives you any relief or have you already gotten what you've asked for?

MR. YERUSHALMI: Well, we haven't gotten what we asked for, as we made very clear, Your Honor, in the reply and in the actual motion. They provided me spreadsheets and we've provided an exhibit, again, as part of the meet and confer process, at which we point out that the spreadsheet itself was not accurate. It didn't actually address the documents that were responsive to the request in many instances. Now, I note, Your Honor, that in their opposition brief they didn't take up at all the issue of the inaccuracy in their so-called spreadsheet. So that very much remains before the Court

without any opposition about the so-called spreadsheet that identifies the requests for production of documents and the documents provided. And that's the second issue.

The third issue, which is the privilege log -- again, I think this has been laid out before the Court, especially in the reply brief where we point out the claim of reasonableness to have hidden these documents from the U.S. council of Catholic bishops -- Conference of Catholic Bishops -- that those documents were improperly hidden from plaintiffs. They've been improperly hidden from the state court matter as well. They were only --

THE COURT: Did you --

MR. YERUSHALMI: I'm sorry, Your Honor?

THE COURT: Have those now -- [inaudible].

MR. YERUSHALMI: I'm sorry, I just didn't hear that.

THE COURT: Sure. Have you received those documents from the plaintiff?

MR. YERUSHALMI: Well, no, we did not receive them from the plaintiffs, Your Honor. We only received them from the subpoena that we issued on the U.S. -- [inaudible]. They remained on the privilege log until the day before we filed the motion. And even after that -- after the filing of the motion, at that point there were still three of those documents. They weren't removed until after the filing of the motion. And even then they left the document on, which they claim as work

product. But that came from USCCB without any attorney-client relationship whatsoever. They don't bother to explain how that's not either a waiver or nonexistent work product. That's certainly a waiver issue. But they don't bother, in their opposition brief, to take that issue up. They just simply say, well, it' a draft of --

THE COURT: Mr. --

MR. YERUSHALMI: I'm sorry, go ahead.

THE COURT: Mr. Yerushalmi, are there documents that are still listed on the privilege log that you have not received either from the plaintiff or from a third party?

MR. YERUSHALMI: No. I have received those documents, Your Honor.

THE COURT: Okay. Then, I mean, it seems like this issue has been resolved.

MR. YERUSHALMI: Well, no, it hasn't, Your Honor, because we've sought sanctions because this was clearly intentional conduct, and it was not reasonable under the basis that we've indicated. And the rules state clearly that the Court must issue sanctions when the issue was, quote unquote, resolved only after the motion is filed.

THE COURT: Okay.

MR. YERUSHALMI: I would like to make another point, Your Honor. And it includes also -- [inaudible] -- and that is at no point in time with all of the documents that we've

identified -- and we went through and actually noted some additional documents in the reply brief regarding attachments that appear to be missing, Behavioral Health Services documents that appear to be missing which were referenced but not produced. There has never been a point in time, except after the motion was filed, that plaintiffs in fact abided by the rules which require that to identify a time -- a reasonable period of time to produce the documents. We were told early on before the original motion to compel that they would produce the documents on May 5, not a rolling production. They would just produce the documents. On May 4th, as the motion -- the original motion to compel set out, we were told, Well, we're ready to produce the documents. And that was the only time that they've actually mentioned rolling production. I think I indicated in my reply brief that we hadn't been told of a rolling production. In preparation for this hearing I saw that email, and it reminded me. That was the first time, but they don't indicate when they're going to actually conclude their rolling production. They said to the Court in their filing on our motion to compel they would produce those documents immediately upon the Court's entry of the discovery protective order. That never happened. And indeed, we're now told, only after the filing of our motion to compel, that, Well, Gee, Your Honor, we can conclude the rolling production within 60 to 90 days. Our request for production was served on the plaintiffs

on March 14th, and now we're told that we're going to get some additional documents. Now, we don't know whether those are going to be newly created documents, which the motion doesn't -- [inaudible]. When those documents are produced, if they're newly created, we'll deal with those. That's standard. You supplement your production as new documents are created. But we're not talking about new documents. They've produced documents in their rolling production, including up until and after the motion to compel, that were in the attorneys' possession because they were their own emails for over a year without any explanation why those documents were not produced.

Your Honor, this is not simply a case of plaintiffs being overburdened. We had extensive meet and confers. They had objected to -- [inaudible] -- documents on 37 of our requests. We resolved 35 of those, either that they would produce, they would produce a limited version of our request for production, or they would not produce over our objection. But we had those extensive discussions, but they came to naught because the plaintiffs, when they did produce documents, produced them as a document dump.

I just want to address the metadata argument. I think we pointed out the metadata can be very useful, and in some cases can be all that's needed, but certainly not in this case because we don't know all the parties. We don't know all the custodians. We don't know what keywords they searched.

What we also know is that even with their own metadata, they have not been able to accurately place documents for request for production, at least to this point.

So we renew our request for an order to compel that plaintiffs go through the email, and to confirm or deny that there's documents. If there's no documents, tell us.

THE COURT: Mr. Yerushalmi, you just mentioned that during an extensive meet and conferral process that you worked out 35 of 37 issues with the plaintiffs, and that they produced documents. I understand that you argue it was a document dump. I also understand that that was part of the meet and conferral process that you raised that, and the plaintiffs provided a spreadsheet that you have some issues with, but that was part of it.

Is this -- is resolving the 35 of 37 issues, were some of those raised in your July 14th email?

MR. YERUSHALMI: Yes, Your Honor, because the documents --

THE COURT: How can you argue that they haven't responded to your email in any way when you describe that an extensive meet and confer process resolved almost all the issues? They produced a spreadsheet. It seems like you're arguing they haven't done anything or have never responded to your July 14th email. It seems like they have, perhaps not in the way you wanted them to, but the conferral process doesn't

say that you have to respond to bullet points on -- to any email that was sent. I mean, there has been a meaningful conferral process here.

MR. YERUSHALMI: Your Honor, I have to say I'm confused by that. And I'm confused because the briefing on this motion sets out very clearly the timing. The conferral process was relatively early on. It was concluded. Then as we went through -- before any documents were produced, then they began a production. When we went through their production, we saw that there were lots of documents that were obvious to us were not produced, which they said they would produce. So what did we do? We did what the rules required. We produced a meet and confer email and sought conference on those issues. Then they proceeded for 60 days to ignore that. Now, if that's not a violation of the discovery rules, I don't know what is. That's not a reasonable or good faith response. And this has all been laid out in the briefing on this motion, Your Honor.

And in addition, I would add that the responses by Your Honor to the defendants Joshua and Stephanie Mast on the motion to compel by plaintiffs indicates that, indeed -- and, of course, the rules require -- that, indeed, the responding party does have a duty -- and a good faith duty -- to respond to the meet and confer process where we took enormous amount of time to identify documents that we thought were missing. And all we asked for was confirmation, yay or nay, do those

documents exist?

And I come back to the so-called spreadsheet that Your Honor mentioned. It is inaccurate. We indicated that in an email during the process prior to filing a motion, and they simply did not respond to it. And, indeed, even in their opposition brief, they have not responded to the inaccuracy of that spreadsheet. That argument by them would be waived in any other situation. I'm not sure why it wouldn't be here.

So again, Your Honor, this is not reasonableness. This is a matter that requires a sanction and certainly an order requiring them to respond to the July 14th email, and to tell us, yes or no, we've produced those documents; or to say, well, your bullet points 1 through 15 are simply inaccurate, and here's why. I'm willing to live with that, but they haven't done any of that.

Thank you, Your Honor.

THE COURT: All right. I'll hear from plaintiffs' counsel.

MS. ECKSTEIN: Thank you, Your Honor. Maya Eckstein again.

Your Honor, plaintiffs have conducted themselves appropriately in all respects with discovery. We have produced more than 1,400 documents, the majority of which were produced in our initial production back in I believe May or June. We continue to review and produce additional documents on a

rolling basis. We also produced a privilege log, which was quite small. I believe it had only 13 documents logged on it. And when we learned that information was otherwise not privileged, we produced those documents -- removed them from the log and produced those documents. Our privilege log today has only three documents on it. We have not refused to produce any document relevant to our parties' claim or defense in litigation.

So let me address the specific arguments made by Mr. Yerushalmi. Number one --

THE COURT: Ms. Eckstein, before you do that, are there any documents that you're withholding at this time or areas that you just haven't been able to get through yet to make a production?

MS. ECKSTEIN: We have additional documents that are responsive that need to be produced, and we're preparing those production. But we are not -- to answer your question more directly, we are not withholding documents that -- other than what we have said in our objections that we will not produce documents. There are a few -- there are some RFP -- requests for production -- where we said we will not respond, but the majority of them we said we are going to produce.

THE COURT: All right. And when do you anticipate making this additional production?

MS. ECKSTEIN: As we said in the brief, it will be

made within 30 to 60 days at the most, at the latest. And the reason I say that is because with the re-collection of our clients' mobile phones, we have a lot of documents that are in a foreign language, and those simply take more time to produce and -- more resources to review and then produce, I should say.

THE COURT: Have you told Mr. Yerushalmi which -- if you know -- which requests that these productions would be responsive to?

MS. ECKSTEIN: I believe we have given him some of that information. I don't know if we've given him all of that information.

THE COURT: Okay. Go ahead.

MS. ECKSTEIN: So -- and again, we took the position that we produce documents as they're maintained in the ordinary course of business. But separate and apart from that, we did more than that. As you noted, we produced a chart on August 3rd that paired each document that by then had been produced -- that's more than 1,200 documents -- with one or more of Mr. Mast's -- Richard Mast's -- requests for production. That's attached as Exhibit D to our opposition brief. Mr. Yerushalmi identified a handful of instances -- out of thousands -- a handful of instances in which he believes that our documents weren't properly paired. We don't dispute that we may have gotten a few pairings wrong, but that is not the basis for a motion to compel.

In addition to that, we produced searchable metadata -- fully searchable metadata, various fields -- to, from, cc, subject, accept date, receive date, custodian, others -- are fully searchable in the metadata. Mr. Yerushalmi complains that he doesn't know what to search for in the metadata. I have to say that strains credulity. His client, Richard Mast, has been involved in this situation since 2019. He knows the key players, the key names, the key officials, the key government actors, the keywords to search for.

In addition to that, we offered to re-produce our entire production as fully searchable TIFFs. That's actually how Mr. Mast's requests for production asked for the documents to be produced. So we were prepared to do that. But Mr. Yerushalmi asked us to instead produce them as PDFs, and so we did. But nonetheless, to resolve this dispute, we offered to re-produce everything as fully searchable TIFFs. He declined. He cannot now claim prejudice for his own refusal to accept fully searchable documents. And the Court has held that the production of fully searchable documents satisfies Rule 34, and that's in the *DE Tech case versus Dell* that we cited in our brief.

With respect to supposed failure to produce documents in the July 14th email, Mr. Yerushalmi ignores that he told us -- as reflected in Exhibit D to our opposition brief -- that if we, quote unquote, paired our document production with his

requests for production, we would resolve, as he said, most of the issues. And so we did that. I recognize he isn't happy with our pairing of documents by identifying a small handful of documents he thinks are inappropriately paired, but there are 1,200-some documents on that pairing chart.

And in addition, to the extent that he continues to complain that we have withheld documents, he does so without specificity, which documents and on what basis. In his reply brief he identifies only one, a document he asserts should have been attached to our Bates Number 4810. Now that he's given us that information, we will look for it; and if we have it, we will produce it. If he identifies with specificity what else he believes is missing, we'll respond, but we can't do it in the ether.

And as to the July 14th email, it does not provide specificity. It's a jumble of references to statements made elsewhere, but it does not identify the documents that Mr. Yerushalmi believes are missing; or to the extent that it does to some extent it is often wrong, as we showed in our opposition brief. Mr. Yerushalmi identifies a couple of documents with respect to the first bullet point in our brief about his July 14th email that we may have misidentified. But we identified many others in that opposition brief as to other RFPs -- requests for production -- as well.

Now, with respect to the privilege log issue, Your

Honor, we explained in our brief the reasonable basis on which we make decisions regarding privilege as they apply -- or we understood them to apply to Martha Jenkins and Carolina Velazquez. We did that based on the content of the documents, as well as discussions with our clients and discussions with Ms. Jenkins herself. Once we learned from USCCB -- the U.S. Conference of Catholic Bishops -- that they did not view the documents as privileged -- that they did not view as privileged documents prepared by those individuals while they volunteered for USCCB, we withdrew the privilege assertion and we produced the documents. So I think, as you have noticed, that issue is resolved. There are no documents on our privilege log today that have not been -- that he claims should be produced. And I'll just note for the record he claims that we were hiding these documents. We logged the documents on a privilege log. They were not hidden. They were logged.

In addition, Your Honor -- let me just look at my notes really quick and make sure there's nothing else I need to add -- with respect to the request for sanctions, Mr. Mast has not even attempted to make the showing required to be entitled. Under Rule 37, our conduct has been substantially justified and in good faith, and fees in this situation certainly would be unjust. We produced a chart pairing thousands of documents to Richard Mast in requests for production. We produced searchable metadata. We offered to re-produce fully searchable

TIFF images of our entire production, and Mr. Mast declined. And we made privilege assertions in good faith, and we withdrew them after -- [inaudible] -- otherwise. There simply is no basis for fees.

And I'll add, as Mr. Yerushalmi has noticed, we had hours of meet and confers with Mr. Yerushalmi on these issues. And I'll say he specifically said that we ignored his July 14th email for 60 days. That simply is not true. There are numerous email correspondences back and forth after that email about that email. We responded to that email. He simply did not like our response. I get it. I understand, but that's not a basis to say that we ignored the email.

And finally, Your Honor -- and particularly as it goes to the issue of sanctions, what is the prejudice here? How has Mr. Richard Mast been harmed by the manner and pace of our document production? He has not identified any prejudice. As I said, we've produced 1,400 documents. We will continue to make the rolling production. And as you know -- I think we're going to talk about that today as well -- we don't have an active schedule in the case. We moved for continuances; again, largely because we couldn't take depositions without documents. Hopefully that's going to be resolved soon. And when the Court sets a new schedule, the parties hopefully will proceed accordingly.

So with that, Your Honor, we ask you to deny the

motion to compel.

THE COURT: All right. Mr. Yerushalmi, anything else?

MR. YERUSHALMI: Yes, Your Honor. I would just like to respond at a relatively high altitude to what I've just heard from plaintiffs' counsel; and that is, number one, there was an extensive meet and confer. But following our July email where we laid out documents that we had good reason -- reasonable basis to believe had not been produced, there has been no substantive meet and confer. Ms. Eckstein references emails back and forth. There was an email or two that said, Well, Gee, it's a lot of work. You know, we'll get to it when we get to it. We had a phone call to the same effect. There has never been any substantive discussion of that email.

Number two, Ms. Eckstein references this notion that we haven't identified with specificity documents that were missing. Well, we can't know what's missing until they respond to the evidence that we bring forth that indicates by implication and inference that documents have not been produced. And all they had to say was: We've given you everything. But we now know, of course, because they claim that there's this rolling production. Your Honor asked Ms. Eckstein directly: Well, have you identified what requests for production are still going to be substantive in this rolling production? Ms. Eckstein gave some kind of ambiguous

answer, as I understood it. But I will be absolutely clear on this point. Nothing has been said about what requests, only -- and the only indication of this rolling production in 60 to 90 days, the only indication -- there's no email, there's no indication other than that May 4th letter from Mr. Elliker -- except what Your Honor can read in the opposition brief. That's all I know about the rolling production in 60 to 90 days.

And then finally I want to just address -- well, actually, there's two more issues -- the issue of identifying of the documents. Ms. Eckstein seems to suggest that I should go to all of the work, after we went through a good number, and the first ones that we went through were simply inaccurate. And Your Honor doesn't have to go through that spreadsheet to see that. Your Honor can look at our reply brief that as we point out in their five bullet points, there are ultimate examples of why our July 14th email was inaccurate. The documents that they claim were responsive -- and they cite to them -- aren't responsive, and we explain exactly why in our reply brief.

Finally, I want to just come to this privilege log issue, because this is certainly sanctionable; and that is the claim that this was reasonable behavior. They got these documents from a third party through their general counsel, an attorney. They, when they received these documents, said, Oh,

Gee, these are privileged attorney-client communications. They didn't bother to recognize that the USCCB never asked for a waiver. If the general counsel had any understanding that these were privileged, of course that's what he would have done from them; before I can produce them to you and your client, I need your client to give me a waiver. He didn't do that. That would have been a huge red flag to any responsible lawyer.

The second thing, when they received these documents, they didn't bother to pick up the phone or write a letter and say, Gee, general counsel, you better not produce these to anyone else because we consider them privileged. And they were hidden because they were never produced. And they were never put on a privilege log, as I understand it, in the state case. It was only in this case, and only to our agitation did we get them on a privilege log, because their first privilege log didn't include anything. Then they -- in addition to not contacting USCCB and asking them to not produce these documents to any third party because they consider them privileged, they didn't bother to call the general counsel and say, Why did you produce these? Aren't they privileged documents? They didn't bother to do that.

Now we're told -- by the way, in their opposition brief, we weren't told anything about a conversation with Ms. Jenkins, the client. Ms. Eckstein now adds only here at the oral argument, not in the opposition brief, Oh, and by the

way, we even talked to Ms. Jenkins and our client. Well, what did they say? Did Ms. Jenkins -- a Wyoming licensed lawyer and not a Virginia Commonwealth lawyer -- did she say, Yeah, I was acting as a lawyer. We had an attorney-client relationship. Did Ms. Velazquez -- who was a social worker for the USCCB -- indicate, well, you know, I was in on all these conversations because I'm employed separately by Ms. Jenkins as a lawyer. That was not the case. And of course, they didn't speak to Ms. Velazquez. Again, if that is reasonable behavior to identify -- as the Fourth Circuit points out, if you're going to claim a privilege, you have the burden to establish those prima facie elements set out in the reply brief. If what the plaintiffs' counsel did in this case is reasonable behavior, then I've missed something for the past 40 years.

Thank you, Your Honor.

MS. ECKSTEIN: Your Honor, may I respond briefly to two points with respect to the privilege log issues?

THE COURT: Yes.

MS. ECKSTEIN: Thank you.

With respect to the receipt of the documents from the USCCB, in the state case we subpoenaed the USCCB, and they produced the documents to us; in other words, USCCB produced the documents to the privilege holder, or what are we thought was the privilege at that point. There was no waiver issue as a result of the USCCB giving those documents to us as we were

what we understood to be the privilege holder.

And second, my last point is Mr. Yerushalmi just said these documents were not on the privilege log in the state case. That is absolutely wrong. They are absolutely on the privilege log produced in the state case.

THE COURT: Mr. Yerushalmi, it is your motion. So if there is anything you want to say on those last two points, you may.

MR. YERUSHALMI: Okay. Since you've invited me, Your Honor, I shall, and only on one of the points. And that is, if the general counsel of the USCCB was going to produce documents, it didn't matter whether it was the plaintiff and his client herself or himself; he would still be required before he produced those documents under subpoena to ask for a waiver because he doesn't know what the client has agreed new counsel should see or not see. He doesn't know who else they might represent. The fact remains is that would have required a waiver. But at the very least, when they saw that he was producing documents pursuant to a third-party subpoena and they considered those privileged, and he didn't identify them as privileged, he just produced them, they would have responded back to him as responsible lawyers and said, Hey, we appreciate this, but in the future, these are privileged. They are not subject to production precisely because they're privileged. They didn't, because, in my view, they understood they weren't

privileged. But we'll leave that for the Court to decide.

Thank you, Your Honor.

THE COURT: All right. Thank you. I will address this motion in a written order as well.

All right. That brings us to the final motion. And this is Pipe Hitter's motion to quash. I do want to hear from Joshua and Stephanie Mast's counsel about what seems to be the proposal that's on the table about that there's been some suggestion that would moot this motion; and that is that if the Masts would agree that the declaration in the documents would be admissible and authentic for use at the evidentiary hearing in front of Judge Moon.

Mr. Francisco, is that something that you can address?

(Pause.)

Mr. Francisco, are you still there?

MR. FRANCISCO: I am on mute, Your Honor. My apologies for that.

We have, I believe, stated our position to the plaintiffs before on this. The documents are largely self-authenticating. I don't anticipate there is any dispute about these -- [inaudible] -- document. You know, they could be sought to be used for evidence. It's just a matter of evidence.

As to the declaration, no, we can't agree to that.

We have a right to cross-examination. There is facts and statements in the declaration that are without any personal knowledge. It would be highly inappropriate to agree that's somehow admissible as evidence in the hearing. We don't think the motion itself is particularly necessary; and that if they want to proceed, that's obviously up to the plaintiffs and what they can prove. But we don't see any reason why we should be asked to agree to hearsay statements being admissible evidence.

THE COURT: But as to the documents, is that something that you can stipulate that the documents produced are authentic and can be admitted into evidence at the evidentiary hearing?

MR. FRANCISCO: I don't have any problem, Your Honor, with authenticity, but I'm not going to make a blanket agreement that they all are admissible because there's relevance considerations and completeness and other evidentiary matters that may come up from these documents. We're talking 600 pages. If they have specific ones to ask about ahead of the hearing, I'm happy to consider them reasonably. But I don't think I can make a blanket agreement, particularly when they're talking about sanctions and we think they've got a lot of the facts wrong. But authenticity is not an issue.

THE COURT: Why don't we go ahead and move into the motion. It is Pipe Hitter Foundation's motion.

Ms. Contestable, are you going to address that?

MS. CONTESTABLE: I am, Your Honor.

Pipe Hitter is before the Court today, as you recognized, on its motion to quash or for an entry of a protective order. Pipe Hitter's has raised a few different bases for having that motion granted, but the focus for today's motion is going to be on the rules of evidence related to the documents and particularly the depositions.

As it relates to the depositions, Pipe Hitter's position is that it imposes an undue burden on Pipe Hitter, who is a nonparty to this litigation. And that nonparty status entitles Pipe Hitter to special protection under the rules. As articulated in the -- [inaudible] -- versus American International Industries case, a district court's inquiry into the propriety of discovery for nonparties is even more demanding and sensitive than the ones governing discovery generally.

And in the *Virginia Department of Corrections versus Jordan* case, which is a Fourth Circuit case in 2019, the inquiry is that the requesting party should be able to explain why it cannot get the same information or comparable information that would also satisfy its needs from one of the parties to the litigation. And here that's exactly what we have. Pipe Hitter, over the course of a one-month period, put some posts on its website about the Mast matter and undertook fundraising efforts by -- [inaudible] -- and disseminating a

few social media -- [inaudible]. The efforts in total raised $2,200, and the Pipe Hitter Foundation contributed a little bit more to give a total of $5,000 to Jonathan Mast on behalf of his brother, Joshua Mast. As soon as the Pipe Hitter Foundation received the cease and desist letter from plaintiffs and learned about the protective order, it immediately took efforts to comply with the plaintiffs' requests, and stayed in regular communication with plaintiffs' counsel about its actions and its compliance efforts. It turned over records. And then it created with Dena Disarro, who is the individual for Pipe Hitter Foundation with knowledge of the Mast matter, a 115-page -- or a 115-paragraph, 15-page declaration outlining the interactions in chronological order with specific citations to the records that were produced in the document binders. Ms. Disarro also swore that the information contained in the declaration is accurate and truthful to her recollection of the events. And under this heightened standard, the Court then has to ask whether or not this deposition is necessary. And our position is that it is not. In the Virginia Department of Corrections --

THE COURT: You heard the Masts' counsel say that they challenge the accuracy of the declaration, right?

MS. CONTESTABLE: I did, yes, Your Honor; however --

THE COURT: Why wouldn't it be necessary to have -- to have a deposition or to have the parties be able to question

Ms. Disarro?

MS. CONTESTABLE: Because the plaintiffs can get the information in order for their motion to show cause by using the information provided by Pipe Hitter in a deposition with the Masts. And the Masts can clarify, based upon the records in the declaration, what information or is not correct. And the information that is provided by Pipe Hitter is not being offered for the truth of the matter asserted, which is to be raised in a hearsay concern. It is that the record -- it is that the information -- [inaudible]. And that does not require cross-examination.

In the United States versus -- [inaudible] -- case, which is a Fourth Circuit case from 1995, the Court said the letter's physical appearance and contents were sufficient to establish its authenticity. The authenticity again goes to something that the Court can consider and look at, and the parties can decide and the Court can look at whether or not it wants to move forward.

And finally, the Disarro declaration, like I said earlier, she already swore under penalty of perjury that the information that was contained in the declaration is truthful and accurate. If the Masts disagree with her recitation and her information, they can explain that fact during a deposition where these documents and declarations are used to question that.

The -- Your Honor, were you trying to say something?

THE COURT: No. Go ahead.

MS. CONTESTABLE: Sorry. There was some feedback there. I didn't know if that was you.

Additionally, I think it's important to recognize that the Federal Rules of Evidence, Rule 1101, applicability of the rules, provides that the Federal Rules of Evidence do not apply in miscellaneous proceedings. And an example of a miscellaneous proceeding is a preliminary example in a criminal case. And while this is not a criminal -- certainly not a criminal case, I think that is an instructive example that could be applied here.

In the United States -- [inaudible] -- case, which is from the U.S. District Court for the Eastern District of North Carolina, the court -- [inaudible] -- Rule 1101(c)(3) are not an exhaustive list. To determine whether 1101 encompasses -- [inaudible] -- miscellaneous proceeding, you can look at other -- you can analogize -- [inaudible] -- proceedings to a specifically included one. Here, the preliminary examination of a criminal case is instructive. It is a review of the fact to determine whether or not to move forward. And under that circumstance, the rules of evidence would not apply.

Here, the circumstance and the posture of the case with this motion matters. This is a motion for an order to show cause. It's a motion to begin the process of determining

whether or not to initiate contempt proceedings. That is the exact type of motion that could be construed as a miscellaneous proceeding, and therefore not subject to the rules of evidence that are -- that have been brought up by the plaintiff.

And finally, in our motion we raised a number of other jurisdictional grounds that are central to the issue of whether or not the subpoena is valid. In *United States Catholic Conference versus Abortion Rights Mobilization,* a Supreme Court case, the court indicated there that the subpoena power of the court cannot be more extensive than it should. While we're not going to go through the -- all of the subject matter jurisdiction arguments today -- we'll rely on the brief -- I do want to bring up that matter and point the Court's direction to it in deciding whether or not to grant the motion to quash.

THE COURT: Thank you, Ms. Contestable.

Ms. Eckstein, are you --

MS. ECKSTEIN: Mr. Powell will. Thank you.

THE COURT: Mr. Powell?

MR. POWELL: Yes, sir, Your Honor, good afternoon. Lewis Powell for the plaintiffs in response to the Pipe Hitter Foundation's motion to quash.

With Your Honor's indulgence, I'd like to back up just a little bit to understand what's really going on here. Let's focus first on what we knew when we filed our second

motion to show cause on June 14th, and also on what we did not know when we filed that motion. After setting the table a bit, I will address the specific arguments advanced by the Pipe Hitter Foundation and one defendant, Mr. Osmani -- the only one, interestingly, to have filed a brief in support of the Pipe Hitter Foundation's motion to prevent us from taking a very focused and very limited deposition regarding its complicity in Jonathan and Stephanie Mast's second violation of the protective order. Whether that complicity was knowing or unknowing is, for now at least, an open question. It can only be reliably answered if we are allowed to depose the Pipe Hitter Foundation.

Your Honor, as you know, Judge Moon entered a protective order last fall, the specific purpose of which was to protect the identity of Baby Doe for her own and her Afghan parents' protection, and for the protection of their extended family back home in Afghanistan. Upon learning in early June of this year that Joshua and maybe Stephanie Mast had once again violated the protective order, we promptly moved on June 14 for the Masts to show cause why they should not be held in contempt for this second violation.

We based our motion on what we then knew. We knew that an outfit called the Pipe Hitter Foundation had agreed to help the Masts raise money for their defense against the pending state and federal court actions filed by John and Jane

Doe, the Afghan parents of Baby Doe. In the state court action, as you know, John and Jane Doe are seeking to vindicate their parental rights and regain custody of Baby Doe. In the federal court case here, the Does are seeking specific declaratory relief and substantial money damages. As Ms. Eckstein noted earlier, different relief, different case.

We also knew because on June 6, Joshua Mast's younger brother, Jonathan, had given an on-air interview with One America News Network, during which images of Baby Doe were displayed. In that interview, Jonathan specifically asked for money to be sent to the Pipe Hitter Foundation to help his brother and sister-in-law. That interview can still be viewed today via the One America News Network's website.

We also knew when we filed the motion for sanctions because the Pipe Hitter Foundation and two of its principals had posted on the Internet what they called the Mast story, all in support of the fundraising. These postings, like the One American News interview with Jonathan Mast, also included photos of Baby Doe.

What we did not know when we filed the motion to show cause, but what we reasonably suspected, was that Joshua and Stephanie Mast were responsible for all of this. After all, who else would have had the motive to support this publicity and fundraising campaign? And who else would have had access to all of the photos of Baby Doe that were spread across the

Internet by the Pipe Hitter Foundation and One American News? Given the Masts' first violation of the protective order in January when they gave extensive on-air interviews with CBS *This Morning* on two successive days, during which photos of Baby Doe were displayed, the answer to this question seemed obvious. But we concluded that we needed to take limited discovery to confirm our suspicions. So we undertook to take such limited discovery from Jonathan Mast and from the Pipe Hitter Foundation. Jonathan agreed to produce documents and to be deposed. On July 14th, he produced 39 documents. Three days later, I took his deposition.

We also served a subpoena on the Pipe Hitter Foundation with five specific requests for documents and a demand to depose the Pipe Hitter Foundation regarding seven narrowly tailored topics. On July 9, the Pipe Hitter Foundation produced 639 pages of documents, but it refused a deposition. Instead, it provided to us a declaration from its executive director, Dena Disarro. This declaration is 15 pages long and contains 115 separately numbered paragraphs. It confirms all of our suspicions regarding the Masts' second violation of the protective order. Judge, I hope you have read it. It is Exhibit 2 to the Pipe Hitter Foundation's motion to quash. While we appreciated Ms. Contestable's effort to avoid the necessity of a deposition, we were concerned -- rightly so, I think -- about the admissibility of the declaration. After

all, it is hearsay. In particular, counsel for the Masts have had no opportunity to cross-examine Ms. Disarro. We asked them if they would agree to the truthfulness of the facts set forth in the declaration -- similar to the question you posed earlier, Judge -- and if they would agree to the admissibility of the Pipe Hitter Foundation's documents. They declined. We have no quarrel with that decision, but it left us with no alternative but to insist on the deposition. On July 18, the Pipe Hitter Foundation filed the motion to quash that we are addressing today.

Meanwhile, Judge -- and importantly, I think, for context -- by the time the Pipe Hitter Foundation filed its motion to quash, the Masts had responded to our motion to show cause. Incredibly, on page 6 of their opposition, they said this, quote, "Without proof, John and Jane Doe argue that Joshua and Stephanie Mast must have used Jonathan as their agent and must have provided information to the Pipe Hitter Foundation, but there is no factual support for that proposition," closed quote. Now, of course, Judge, there is abundant factual support for a motion to show cause. It lies in three places: The Disarro declaration, the Pipe Hitter Foundation's documents, and Jonathan Mast's deposition testimony.

Now, in its motion to quash, specifically its Rule 45 argument, the Pipe Hitter Foundation argues on page 4, quote,

"Requiring Pipe Hitter to provide live deposition testimony would be unduly burdensome, expensive, cumulative, disproportionate to the needs of the plaintiffs' motion to show cause, and otherwise improper under Rules 26 and 45," closed quote.

Really? These conclusive assertions are entirely unpersuasive. We have assured Ms. Contestable that our examination would not exceed four hours. I suspect it will be much shorter than that. After all, we already have the lengthy declaration. So the witness has obviously been thoroughly prepared already. Any additional expense would be minimal, especially compared to whatever it has cost the Pipe Hitter Foundation to resist the deposition. While the deposition I suppose would arguably be cumulative of the declaration, that does not solve the hearsay problem. I fail to understand how the nominal time and money, quote unquote, burdens of this particular deposition could possibly be disproportionate to the needs of our motion to show cause. As we noted in the very first sentence of our opposition to the motion to show cause, quote, "The Pipe Hitter Foundation played an indispensable role in facilitating Joshua and Stephanie Mast's second violation of this Court's protective order." This is why we argued on page 3 that, quote, "It is difficult to imagine a more fitting deployment of Rule 45," closed quote.

No doubt we suspect, recognizing the weaknesses of

its Rule 26 and Rule 45 arguments, the Pipe Hitter Foundation resorted to what I guess can only charitably describe as a Hail Mary. It argues that our entire case should be dismissed for lack of subject matter jurisdiction. The Pipe Hitter Foundation says there is neither federal question nor diversity jurisdiction. Both arguments fail. Your Honor, Ms. Contestable didn't spend much, if any, time on these arguments. I'm prepared to get into them in great detail because both she and counsel for Mr. Osmani argue them in their briefs. I'm happy to go through them. It won't take me very long, but I think it's important for me to address them if Your Honor wants me to.

THE COURT: Mr. Powell, if there's anything that you want to point out from the briefs, or if there's anything additional, then we can certainly use that time to do that on the jurisdictional arguments. Otherwise, if you'd like to rely on your briefing, you can do that.

MR. POWELL: It won't take me very long, Your Honor. It's a little bit complicated because it's a five-count complaint, and not every defendant is named in each of the counts. There is a correction that Mr. Osmani made regarding his citizenship that I think is important for me to acknowledge.

THE COURT: All right. Go ahead.

MR. POWELL: In summary, Judge, there is federal

question jurisdiction over all of the defendants for Counts One and Three. Count One is for intentional interference with the Does' parental rights. Count Three is for conspiracy. Part of the conspiracy, obviously, identifies as overt acts the conduct of the defendants that constitutes intentional interference with the Does' parental rights. With one exception, there is diversity jurisdiction over all of the defendants for the remaining three counts: Count Two is for fraud; Count Four is for intentional infliction of emotional distress; Count Five is for false imprisonment. The exception has to do with Defendant Osmani in Count Four. He is not named in Counts Two and Five. On August the 1st, he filed a brief in support of the Pipe Hitter Foundation's argument.

Let's address the diversity jurisdiction question first. The Pipe Hitter Foundation and Osmani say there is no jurisdiction because he is a citizen of Afghanistan; and, thus, is not diverse as to the Does, who are also Afghan citizens. Osmani filed a declaration in support of this argument. Until we received that declaration on August 1, we were operating under the assumption that Osmani was a U.S. citizen, as his own lawyer had represented to the Fluvanna Circuit Court last October the 4th. Evidently, however --

(Overlapping speakers.)

MR. BROOKS: Your Honor -- (inaudible).

THE COURT: Mr. Brooks, please don't interrupt. I

know you said that you didn't want to participate, but I'll give you an opportunity to after Mr. Powell is finished.

MR. POWELL: Judge, evidently either Mr. Brooks misspoke, or the court reporter misheard him or misunderstood him. In any event, as we said in our brief in response to Mr. Osmani's motion, we have no reason not to believe his declaration that he was, and remains today, an Afghan citizen. Does the fact that there is no diversity jurisdiction as to him for one count require dismissal of our entire case? Of course not. Of the five counts in our amended complaint, Osmani is named in only three of them: Count One, tortious interference with parental rights; Count Two, conspiracy; and Count Four, intentional infliction of emotional distress. Importantly, however, there is a federal question jurisdiction as to Counts One and Two. More about that in a moment.

So Osmani would still be a defendant, even if we had not included Count Four at all, or had not named him in that count. At most, therefore, because of the diversity question he has fairly raised, he should be let off the hook for Count Four; or, more appropriately in our judgment, the Court should assert supplemental jurisdiction over him for Count Four. That would serve the interest of judicial economy because then all of the Does' claims against all of the defendants would be resolved in this case.

Now let's turn to whether there is federal question

jurisdiction as to Counts One and Three. The answer is clearly yes. As the parties agree, the controlling precedent is the Supreme Court's 2013 decision in *Gunn v. Minton*. *Gunn* sets forth a four-part test for whether a state common law claim can, quote unquote, arise under the constitutional laws or treaties of the United States, as set forth in 28 U.S.C. Section 1331. Under *Gunn*, the asserted federal issue must be, first, necessarily raised; second, actually disputed; third, substantial; and fourth, it must be capable of resolution in federal court without disrupting the federal state bounds. The Pipe Hitter Foundation and Mr. Osmani argue that we fail the *Gunn* test. Of course, we disagree.

First, a federal issue is necessarily raised here because the entire foundation of the Does' claim to be Baby Doe's parents rest on the U.S. government's exercise of its exclusive foreign policy responsibilities when it transferred custody of Baby Doe to the Afghan government so that she could be united with members of her extended family. The declaratory relief that we seek spells this out in great detail.

Second, there can be no question -- and I don't think there is one here -- that the Masts vigorously contest the Does' claim to be Baby Doe's parents. The Pipe Hitter Foundation and Osmani do not argue otherwise, as best I can recall.

Third, it is similarly clear that the federal issue

is, quote unquote, substantial. While it may arguably be true, as the Pipe Hitter Foundation and Osmani suggest, that the specific facts of our case are unlikely to be repeated, that does not mean that the federal issue is not substantial. If the Court has any doubt about that, I encourage you to read -- if you have not already done so, which seems to me unlikely -- the U.S. government's statement of interest which it filed in the state court action on August 22nd of last year. That statement of interest is Exhibit 1 to our amended complaint. It's 21 pages long. It is a resounding explanation of, and defense of, the federal government's position on the legality of the Does' parental rights. Judge, it is essential to the preservation of our entire system of federal-state balance to confirm that whenever our federal government makes a foreign policy decision, no state court can act in any way that interferes with or undermines that decision. The declaratory relief we seek is entirely line with the U.S. government's position.

Fourth -- and finally, Your Honor -- our case can be resolved in this Court without disrupting the state balance -- the federal-state balance, excuse me. The family law exception that has been briefed simply does not apply to federal question cases. The Fourth Circuit so held in its 1997 decision in *U.S. against Johnson* at 114 F.3d 476, specifically at page 481 where the court said that this exception applies, quote, "only as a

judicially imposed limitation on diversity jurisdiction."

The U.S. Supreme Court's decision just four months ago in the *Haaland against Brackeen* case is in line with this. There the court brushed aside the plaintiff's argument that family law is wholly exempt from federal regulation, calling that argument a, quote, "nonstarter." The citation for that, Your Honor, is at 143 Supreme Court Reporter. The first page is 476. The language I just quoted is found at page 481.

Moreover, Judge, and notwithstanding defendants' stubborn mischaracterization -- if you don't mind me calling it that -- of our amended complaint, we are not asking this Court to resolve the adoption and custody issues that the parties are litigating in the Virginia state court system. Instead, as I have already noted, and as Ms. Eckstein has mentioned, our case here seeks only declaratory relief and substantial money damages. We have different parties and different claims than in state court.

Finally, Judge, even if the Court were to agree that there is no federal question jurisdiction, it is crystal clear that we have diversity jurisdiction as to all of the defendants other than Osmani. For that reason, dismissal of our entire case would not be supportable.

Let me wrap up, Judge. Let me start by responding to two points that Ms. Contestable made. She suggested that we can get all of the information we need from the Masts. I have

to say in response to that: Really? I'm not quite sure how to respond to that, Judge, other than to say that Joshua Mast in particular had extensive communications with Ms. Disarro at the Pipe Hitter Foundation lasting over several months, all of which led inexorably to the One American News network interview of Joshua Mast's brother, and all of which led inexorably to the Pipe Hitter Foundation's own conduct that, knowingly or unknowingly, was a violation of the Court's protective order. We must be allowed to take the deposition of the Pipe Hitter Foundation, period, hard stop.

Ms. Contestable also raised -- as she had in her brief -- the argument that somehow this is a miscellaneous proceeding to which the Federal Rules of Evidence do not apply. I confess I just do not understand that argument. I don't think the cases that she cites are applicable. Our motion to show cause is hardly miscellaneous. I don't mean to presume to know how Judge Moon would rule on these evidentiary issues, but I find it hard to believe that he would suspend the rules of evidence during our motion to show cause.

THE COURT: And your motion to show cause is to have the Masts found in contempt by the Court?

MR. POWELL: Correct. So it seems to be whatever our motion to show cause is, it is not a miscellaneous proceeding, whatever a miscellaneous proceeding is.

Judge, to be clear, I think -- I hope the Court

understands this -- we're seeking a limited and focused deposition of the Pipe Hitter Foundation. It is hardly a stranger to this dispute. Even if it is true, as the Pipe Hitter Foundation asserts, that it was unaware of this Court's protective order when it agreed to help the Masts, that should not insulate it from a deposition. Moreover, as we noted, the declaration is hearsay, and that necessitates our being able to take her deposition to avoid the problem and to have her authenticate the Pipe Hitter Foundation's documents. I appreciate what Mr. Francisco said. But if, as I hope will be the case, you're going to allow us to take her deposition, we're likely going to want to ask her questions that will further support the admissibility in the hearing on the motion to show cause of the Pipe Hitter Foundation's documents.

Together, we think her deposition and the Pipe Hitter Foundation documents will prove beyond any shadow of a doubt that the Masts intentionally violated the protective order, and that Joshua Mast tried to cover his tracks by using a signal to communicate with the Pipe Hitter Foundation, and by enlisting his brother -- if I said Joshua a moment ago, Judge, I should have said Joshua, not Jonathan -- Joshua Mast not only used signal to try to cover his tracks with his communications with the Pipe Hitter Foundation, he enlisted his brother Jonathan to participate in the scheme by being the family's spokesperson.

THE COURT: As to the deposition, you would agree to

limit it to four hours and to train the subjects on the declaration that's already been provided and the documents that were produced?

MR. POWELL: Yes, Judge, four hours for us on direct. I don't know -- I cannot predict how many questions might be asked by counsel for the other parties that might justify redirect on our part. But again, this is not an all-day deposition -- not in my imagination, at least, Your Honor. And, of course, the focus of the deposition will be on the declaration and having the witness embrace the factual assertions in her declaration. I don't think it will be necessary to go through each and every one of the 115 paragraphs. I think summary testimony by her should suffice, but there are questions that occur to us from the content of the declaration that only she can answer. We cannot get from anybody but her what may have been said by Joshua Mast to her, what conversations she may have had internally about the Pipe Hitter Foundation's decision-making to try to help the Masts raise money and to get publicity for what they consider their side of the story here.

I noted earlier, Your Honor, that our -- I'm sorry, Judge, I didn't mean to --

THE COURT: That wasn't me. Go ahead, Mr. Powell.

MR. POWELL: Yeah, so our subpoena identifies only I think seven deposition topics. They're all directly related to

what we believe we can prove is at least Joshua Mast's -- and perhaps Stephanie Mast's also -- second violation of the protective order.

MR. FRANCISCO: Your Honor, this is Michael Francisco for the Masts. I would like an opportunity to be heard, if appropriate, on this motion.

THE COURT: That's fine.

And Mr. Powell, do you agree that the deposition could be conducted remotely?

MR. POWELL: Yes, sir. And we've made that clear from the get-go.

THE COURT: Okay. All right. I know several other people would like to weigh in on this motion. Let's see. Ms. Contestable, I'll circle back to you at the end, but I'll hear from Mr. Brooks for Osmani.

MR. BROOKS: Thank you, Your Honor. I apologize for my objection. I just wanted to -- we're willing to rest on our pleadings and on the pleadings of the Pipe Hitter Foundation on the jurisdictional issue. So I won't argue those here.

But I did just want to make clear that what drew us into this motion was actually the use of my own words by the plaintiffs, which I find hard to believe that they relied on because those alleged words -- I don't believe I actually said it; I think it was the court reporter's error -- but occurred before the filing of the amended complaint where they again

identify Mr. Osmani as an alien as opposed to a citizen. So I don't think anyone in this case has ever actually been confused as to whetter Mr. Osmani is a citizen, especially because I also told counsel for the plaintiffs in a meet and confer that we had that he is not a citizen. But to the extent that there has been some suggestion that I made an intentional misrepresentation, or even a very bad error, I just wish to push back on that and state that for the record.

Thank you, Your Honor.

THE COURT: And Mr. Brooks, I don't hear Mr. Powell saying that there was any intentional misrepresentation or any misconduct on your part.

All right. Mr. Francisco?

MR. FRANCISCO: Yes, Your Honor. I think it's appropriate to address some of the issues Mr. Powell raised in setting the table for this motion and to clarify we don't think -- we certainly agree that Pipe Hitter should not be deposed in this matter, and that it's unduly burdensome and in violation of the rules. And if -- [inaudible] -- suggest certain parts of the declaration that are not hearsay be considered, then we'll of course consider those, but a deposition is not going to fix the hearsay issue. There is still going to be hearsay even if there is a deposition. But our position is that if they think they've got sanctionable conduct, then let's have a hearing on it. They've had

discovery on it. They've taken a six-hour deposition of Jonathan Mast, Your Honor. They have all the Pipe Hitter's documents. They have all Jonathan Mast's documents. They had a six-hour deposition when they could ask him as many times as they wanted: Did Josh Mast violate the protective order, and every form of that question. And the answer was always consistently no. And now we hear that, Well, Your Honor, we need to do one more deposition of a third party because that maybe is going to confirm our suspicion that there was a grand conspiracy by my client, Joshua Mast, to violate the protective order. We're confident on the merits there was no violation of the protective order. We're talking a couple of emails and a handful of pictures and press reporting that Joshua Mast is under oath saying that he conducted on his own. This is just not something that needs to be made into a giant discovery battle. They've already had extensive discovery on it, and that's our position. If they think they can show something, then we should move forward. But having another four-hour, third-party deposition to a nonparty so maybe this time they can find the evidence that's not there we think is highly inappropriate.

MR. POWELL: Your Honor, I don't mean to get between you and Ms. Contestable, but I would like to respond briefly to what Mr. Francisco just said.

THE COURT: Yeah, I would like to hear your response,

Mr. Powell, and especially about whether the Pipe Hitter Foundation representative would need to be -- would need to appear at the evidentiary hearing.

MR. POWELL: I don't think so, Your Honor, provided we've had an opportunity to take her deposition, which, of course, would be attended by any other lawyers who want to participate, and they will have ample opportunity to take her deposition and to ask her questions.

I understood Mr. Francisco to say first that the Pipe Hitter Foundation should not be deposed, but that even if it were to be deposed, that would not solve the hearsay question. I think I understand him to be saying that won't necessarily solve the question whether the declaration itself is hearsay, but whichever one of my members of our team takes the deposition, I think you can be sure that the question will be asked of the witness whether she affirms the truth of the facts asserted in the deposition. I think she's going to say that she does. I think the hearsay question is going to be resolved through the deposition, and her deposition testimony will then be admissible in the hearing on the motion to show cause, just as any witness beyond the subpoena power of the Court, any deposition testimony by such a witness would be admissible as though the witness were there testifying live.

So all this causes me to wonder why do the Masts not want us to take the Pipe Hitter Foundation's deposition?

Forgive me for being suspicious of their motive, but I must be.

THE COURT: Thank you, Mr. Powell.

Ms. Contestable?

MS. CONTESTABLE: Yes, Your Honor. Sorry. I was on mute.

Pipe Hitter Foundation -- [inaudible] -- the truthfulness of the information that was in the declaration. I think I have produced over 600 documents. Ms. Disarro is being asked to sit for a Rule 30(b)(6) deposition, and it's unreasonably cumulative or duplicative based upon substantial substantive information that we've already provided, and the fact that a Rule 30(b)(6) deponent is likely going to repeat the information in testimonial form, which is exactly what would happen here. The declaration was prepared thoughtfully and intentionally for this purpose, to retract all of the concerns that were outlined and inferred from the documents and subpoena requests. And we conferred with plaintiffs' counsel and advised them that if they wanted -- [inaudible] -- expanded upon or clarified, that we were willing to do so. We have cooperated. We have acted in good faith from the very beginning, and we have not hidden the ball. We've asserted no privileges. We have, as a nonparty, been cooperative and compliant. Requiring Pipe Hitter to sit for a deposition -- which, according to plaintiffs, is going to be four hours on their part, plus any other cross-examination -- is not an

insubstantial amount of time or an insubstantial burden, or an insubstantial burden on our client. They are small nonprofit that has already incurred expensive legal fees battling over this matter.

Additionally, I want to quickly address the jurisdictional argument as it relates to Defendant Osmani. The plaintiffs seem to gloss over the fact that it is a critical issue as to diversity. It either exists at the time of filing or it doesn't. And where it does not, the Court then has to conduct a very thoughtful, careful analysis as to whether or not to dismiss the entire action or to dismiss just Osmani. And the plaintiffs' response to our motion only addresses this matter in a footnote of I believe three or four sentences, and fails to advance any substantive legal arguments or principles to support the conclusions that the proper remedy to correct the issues of diversity jurisdiction is to just excuse Osmani and move forward.

I'm just checking my notes for a second.

I think that's all the items that we wanted to respond to here. Actually, sorry, one more note, Your Honor, if I may.

THE COURT: Sure.

MS. CONTESTABLE: Pipe Hitter, as I was saying, has fully responded and complied with plaintiffs, and worked in a cooperative manner. If there are issues that need to be worked

out as to the documents that were produced and interactions of that relationship, those are matters that should be taken up with the Masts, not with Pipe Hitter.

And that's it for us, Your Honor.

MR. YERUSHALMI: Your Honor, I apologize for jumping in.

THE COURT: Hold on a second. I'm happy to hear from anybody who wants to say something, but why don't you go ahead and let's do this orderly. Just identify yourself and then go ahead.

MR. YERUSHALMI: Your Honor, David Yerushalmi. I'd like to be heard for literally a sentence on this matter.

THE COURT: Go ahead.

MR. YERUSHALMI: I'm sorry, Your Honor?

THE COURT: Go ahead, please.

MR. YERUSHALMI: Okay. Thank you.

Mr. Powell had indicated that the other parties -- or my client -- had not responded on the jurisdictional question were outside the scope of the deposition itself. We considered the briefing fairly well briefed; however, to the extent that the Court is going to order the deposition, it seems to me by implication that it has ruled on the jurisdictional question. Insofar as that is a dispositive issue, our intention was, under Rule 72, when the Court issues what I think would be a report and recommendation to the judge, to respond at that

time.

Thank you, Your Honor.

THE COURT: Did somebody else want to say something?

MR. FRANCISCO: Your Honor, Michael Francisco briefly again for Joshua and Stephanie Mast.

I just want to highlight that the plaintiffs aren't identifying what information they think they can learn in a four-hour deposition that's not already revealed in the documents or the deposition of Jonathan Mast. The documents show frankly two emails, maybe, and a handful of [inaudible] messages that have already been produced. I don't think there's any reason to think there were phone calls of any substance -- I'm not even sure there were any -- between the Pipe Hitter and my client that target a sanctions motion. And then everything indicates in the documents and the deposition that's already occurred that Josh Mast had no contact. Everything was handled by Jonathan Mast, who has been deposed. And then there was a couple of emails about: Could you please take down a picture after the story went up. But I'm really at a loss to see how a deposition is even supposed to get any information that could be useful for the plaintiffs' motion that hasn't already been covered by the document discovery and by the six-hour deposition.

THE COURT: I'll take that into consideration. I will issue a written opinion on that motion as well.

I think that's everything for the motions. The trial date, I think I indicated that we could discuss the schedule and the resetting of the trial date today as well. In the motion to modify the pretrial order, the parties had different proposals about expert disclosure deadlines and then also the trial date.

Are those still your positions, Mr. Francisco? Is it still your position that -- as to the May deadlines for expert disclosures, September 2024 trial date?

MR. FRANCISCO: Yes, Your Honor.

THE COURT: And Ms. Eckstein or Mr. Powell, are you still sticking to your dates in that motion?

MS. ECKSTEIN: Yes, Your Honor. Thank you.

THE COURT: Is there anything further that anybody wants to say as to the grounds for choosing one trial date over the other? It looks like that's the main issue, and the expert disclosure deadline would go off of that trial date.

Mr. Yerushalmi, I'm happy to hear your input there, and Mr. Brooks, and then Mr. Hoernlein as well.

MR. YERUSHALMI: Yes, Your Honor. David Yerushalmi. The September date was actually the date that we initially proposed, and the other defendants agreed, and the plaintiffs disagreed and wanted an earlier date. Given where we are today, I would say it's fairly obvious that even the September date is premature. Now, obviously the Court can set it as a

kind of marker in the ground, but the reality is the motions to dismiss are still pending, and I don't know when they're going to be decided. When they are decided, if they're decided in the negative, then there is most certainly going to be -- at least from my client -- a counterclaim, at least that's our present intention. I don't want to be misunderstood. That's our present intention. So that's going to engender more motions to dismiss. It's going to engender more discovery. We have submitted our request for production on March 14th. We're now October, and plaintiffs are telling the Court another 60 to 90 days before we get all their documents. So that's going to --

THE COURT: I think they said 30 to 60 is my recollection.

MR. YERUSHALMI: No, Your Honor. I think they said 60 to 90 --

THE COURT: Well, the record will --

MR. YERUSHALMI: -- in the opposition brief. Yes, Your Honor.

So -- and even if it's 30 to 60, that takes us -- but it's not -- that takes us past the end of the year. And so there is just no way in the world this case is going to be ready for trial in September. There is just -- we haven't even started the depositions. And when we take depositions, we might find out a whole slew of additional information, as is

typically the case. So I would actually argue that setting a trial date in September is premature, unless it's simply a marker. Certainly May is -- using a term that the plaintiffs used -- nonsensical. I don't understand that at all.

Thank you.

THE COURT: All right.

MS. ECKSTEIN: Yes, Your Honor.

THE COURT: Ms. Eckstein?

MS. ECKSTEIN: Yes, I can respond briefly. Thank you. Just really briefly, first of all, you are correct. It was 30 to 60 days.

The idea that we can't be ready for trial in September -- let alone June -- baffles me. Maybe that's because I often litigate in the Eastern District of Virginia, which is considered a rocket docket. Cases go to trial in six to nine months. We will be ready in May or June, or whatever the -- I think it was June, excuse me, June that we put in the motion. We will be ready in June.

THE COURT: All right. Mr. Francisco, is there anything else that you would want to say as to the --

MR. FRANCISCO: Your Honor, we're docket number 300. Our motion to dismiss has been pending for almost a year. Their motion to show cause -- which was argued in January, I recall -- still has never even been decided. I mean, sure, I could pound the table and say we'll be ready for trial in June

if that's what the Court says, but my experience tells me that September is a more realistic date. We're just getting started in discovery in this case.

THE COURT: Mr. Brooks, anything?

MR. BROOKS: Thank you, Your Honor. I would agree with Mr. Yerushalmi. We, likewise, are in the position that we very well may file a counterclaim if we get a ruling on the motions to dismiss and Mr. Osmani is still in the case. We feel like that would change the dynamic. So I agree with Mr. Yerushalmi.

Thank you, Your Honor.

MR. YERUSHALMI: Your Honor, this is David Mr. Yerushalmi. I just wanted to apologize and say yes, I looked at the opposition brief. Apparently my 68 year-old memory wasn't as good as I thought. It's 30 to 60 days.

THE COURT: Mr. Hoernlein, anything about the trial date?

MR. HOERNLEIN: Your Honor, generally no, although I would just say for Ms. Motley, if Ms. Motley isn't dismissed from the case, she will also likely assert counterclaims against the Does. And so, May/June might be a little aggressive, but we're not taking any strong position on it. We'll be ready to try the case if we're still in it when the Court sets the date.

THE COURT: Well, given the number of motions that

are still outstanding and the amount of work that seems like is going to be necessary in this case to bring it to trial, I'd rather try and set the September date as a firm one, and really push to make sure that that date holds and make sure that the other deadlines remain in place. The June one, I think it would be hard to get this case ready for trial by then. So what I will do is set the trial date for September 9th through the 20th in front of Judge Moon, with the plaintiffs' initial disclosures on May 1st and the defendants' on May 16th.

All right. Is there anything else?

MR. YERUSHALMI: Yes, Your Honor. This is David Yerushalmi. I just wanted to ask for clarification. When you say a firm date, given that we don't even have the motion to dismiss resolved, and given that there is going to be additional discovery, and given that there is going to be dispositive Rule 56 motions, when you say a firm date, I'm just trying to understand what that means in context.

THE COURT: Well, plan on that being the trial date, Mr. Yerushalmi.

All right. Is there anything else that we need to take up today?

MS. ECKSTEIN: Not from plaintiffs. Thank you, Your Honor.

THE COURT: All right. Thank you all. Then that brings this hearing to a close.

(Proceedings adjourned, 1:13 p.m.)

C E R T I F I C A T E

I, Lisa M. Blair, RMR/CRR, Official Court Reporter for the United States District Court for the Western District of Virginia, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings reported by me using the stenotype reporting method in conjunction with computer-aided transcription, and that same is a true and correct transcript to the best of my ability and understanding.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ Lisa M. Blair Date: October 17, 2023